

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2009AP702
2009AP932
2009AP1416
2009AP1561**

**Cir. Ct. Nos. 2008CV14799
2008CV14798
2009CV1191
2009CV1190**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

Nos. 2009AP702 & 2009AP932

STEPHEN LEE,

PETITIONER-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT.

Nos. 2009AP1416 & 2009AP1561

STEPHEN LEE,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County:
JEAN W. DI MOTTO, MAXINE A. WHITE and DAVID A. HANSHER, Judges.
Affirmed.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Stephen Lee appeals from four circuit court orders that affirm dismissals by the Labor and Industry Review Commission (“Commission”) of Lee’s four employment discrimination complaints against four different prospective employers. The sole issue Lee raises in each of the four cases is whether each of the four employers impermissibly asked applicants about their conviction record. We conclude that the Commission’s decision in each case was consistent with the plain language of WIS. STAT. § 111.335(1)(c)1. (2007-08) because such an inquiry by a prospective employer does not violate the Wisconsin Fair Employment Act (the “Act”) if the circumstances of the disclosed “felony, misdemeanor or other offense ... substantially relate to the circumstances of the particular job [sought]” pursuant to § 111.335(1)(c)1.¹ Therefore, we affirm.

¶2 These cases involve applications from four different employers. All of the applications involve the same problematic inquiry, and Lee challenges each inquiry as discriminatory for inquiring about the applicant’s criminal record. The similarity of the facts and the problematic clauses, and the Commission’s

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

dismissal of Lee’s employment discrimination complaints and the circuit court’s affirming those dismissals led us to consolidate these four appeals.²

¶3 Each of the employment applications asked if the applicant had ever been convicted of a felony, a misdemeanor, or had violated an ordinance.³ Most

² Appeal No. 2009AP702 is from Milwaukee County Circuit Court Case No. 2008CV14799, decided by the Honorable Jean W. DiMotto. The City of Milwaukee was the employer in that case. Appeal No. 2009AP932 is from Milwaukee County Circuit Court Case No. 2008CV14798, decided by the Honorable Maxine A. White. Milwaukee County was the employer in that case. Appeal No. 2009AP1416 is from Milwaukee County Circuit Court Case No. 2009CV1191, decided by the Honorable David A. Hansher. Office Depot was the employer in that case. Appeal No. 2009AP1561 is from Milwaukee County Circuit Court Case No. 2009CV1190, also decided by Judge White. McDonald’s restaurant was the employer in that case.

³ The City and County applications each specified: “If you have ever been convicted of an offense, including felonies, misdemeanors and ordinance violations, or have charges pending, other than minor traffic violations, list details below. If you list convictions, provide your birth date Your birth date will be used for conviction verification only.” The City application requested further details about any affirmative responses, including the charge, date, location and disposition. Both applications also included: “NOTE: Convictions are not an automatic bar to employment but are reviewed in relation to the job for which you applied. Convictions not reported may be cause for rejection or discharge.”

The Office Depot application inquired:

Have you ever been convicted of a crime (either felony or misdemeanor), which has not been sealed, expunged, impounded, erased or statutorily eradicated, or entered a plea of no contest (nolo contendere)?

Yes No

(A conviction record will not necessarily eliminate your candidacy for employment. You do not need to disclose any convictions which have been discharged.)

The McDonald’s application specified, “DURING THE PAST 5 YEARS, HAVE YOU EVER BEEN CONVICTED OF, PLED GUILTY TO OR PLED NO CONTEST TO A CRIME, EXCLUDING MISDEMEANORS AND TRAFFIC VIOLATIONS?” Before that inquiry, the application states, “[a]nswering yes will not necessarily bar you from employment.” The application also states:

(continued)

of the applications then requested details about all affirmative responses. Each application also clarified that an affirmative response would not automatically or necessarily disqualify the applicant for employment.

¶4 Lee filed separate complaints with the Equal Rights Division of the Department of Workforce Development (the “Department”), alleging each prospective employer violated the Act by inquiring about an applicant’s conviction record in its employment application. The Department dismissed each complaint with prejudice because the application’s inquiries did not violate the Act on its face or imply any intent to discriminate.⁴ Lee appealed the dismissals to the Commission. The Commission affirmed the dismissals, emphasizing that:

Because the [Act] permits an employer to make employment decisions based upon an applicant’s conviction record if the circumstances of the offense are substantially related to the circumstances of the particular job, it is implicit that it is not a violation of the [Act] to request conviction record information from an applicant.

Lee sought judicial review in each case. In each of the four cases, the circuit court affirmed the Commission’s decision, recognizing that WIS. STAT. § 111.335(1)(b) and (c)1. allowed an employer to refuse to hire an individual with an arrest or

This independent McDonald’s franchise is an Equal Opportunity Employer. Various federal, state, and local law[s] prohibit discrimination on account of race, color, religion, sex, age, national origin, disability or veterans status, or other categories prohibited by law. It is this McDonald’s franchise policy to comply fully with these laws, as applicable, and information requested on this application will not be used for any purpose prohibited by law.

⁴ Failure to violate the Act on its face was the basis for two of the dismissals; the absence of an intent to discriminate was the basis for the other two dismissals.

criminal record in which the offense “substantially relate[s] to the circumstances of the particular job,” and recognized the application inquiries as requesting information that was permissible in that context. Several of the circuit court decisions were also based on collateral estoppel in that Lee had pursued the dismissal of other complaints on this same basis.

¶5 Lee appeals the four circuit court orders to this court. We consolidated these appeals because all involve Lee’s challenge to employment applications as allegedly violating the Act and discriminating against him on the basis of his arrest or criminal record. Lee raises the same single issue in each appeal; in each appeal Lee challenges an employment application that inquires about the applicant’s criminal history.

¶6 WISCONSIN STAT. § 111.322(2) prohibits the “use [of] any form of application for employment or ... any inquiry in connection with prospective employment” for discriminatory purposes including one’s “conviction record,” or any “information indicating that an individual has been convicted of any felony, misdemeanor or other offense....” WIS. STAT. § 111.32(3). The Act also expressly states that:

Notwithstanding s. 111.322, *it is not employment discrimination* because of conviction record to refuse to employ ... or to bar ... from employment ... any individual who:

1. Has been convicted of any felony, misdemeanor or other offense *the circumstances of which substantially relate to the circumstances of the particular job.*

WIS. STAT. § 111.335(1)(c)1. (emphasis added).

¶7 “[W]e substantively review LIRC’s decision and not that of the circuit court.” *Knight v. LIRC*, 220 Wis. 2d 137, 147, 582 N.W.2d 448 (Ct. App. 1998). “We conclude that great deference should be afforded LIRC’s decision as it is the commission charged with the interpretation and application of [the Act].” *Id.* at 150.

¶8 WISCONSIN STAT. § 111.335(1)(c)1. allows a prospective employer to refuse to hire an applicant for employment if that applicant’s conviction “of any felony, misdemeanor or other offense ... substantially relate[s] to the circumstances of the particular job.” Consequently, an employment application that inquires about an applicant’s criminal record and “the circumstances” of any offenses to determine whether that record “substantially relate[s] to the circumstances of the particular job [the applicant is seeking]” does not constitute employment discrimination pursuant to § 111.335(1)(c)1. This is particularly true when the application also explains that a criminal record in and of itself does not automatically or necessarily disqualify an applicant for employment. We have also held that falsification of an employment application by failing to disclose one’s criminal history constitutes misconduct sufficient for discharge from employment. *See Miller Brewing Co. v. DILHR*, 103 Wis. 2d 496, 505, 308 N.W.2d 922 (Ct. App. 1981). As we explained in *Miller Brewing*, “[the Act] prohibits arbitrary discrimination. It does not prohibit an employer from asking questions about criminal records; it does not create a license in the employee to lie about those records.” *Id.* at 504.

¶9 Lee contends that the employer who inquires about an applicant’s criminal history obtains the presumably unfavorable information without first knowing whether that information is “substantially relate[d] to the circumstances

of the particular job [the applicant is seeking],” allowing the employer to use the “substantial[] relat[ionship]” exception to obtain sensitive information to then use as a pretext for refusing to hire that applicant. The Commission applied the statutory language to the employment application’s inquiries, explanations and statements of purpose regarding the reason and use of the information about an applicant’s criminal history. It interpreted the “substantial[] relat[ionship] to the circumstances of the particular job [sought]” as permitting those inquiries. *See* WIS. STAT. § 111.335(1)(c)1. Its decision, affirming the dismissal of the complaints for failing to maintain a claim for employment discrimination on the basis of those inquiries, is reasonable and consistent with statutory and case law. *See id.*; *Miller Brewing*, 103 Wis. 2d at 504-05. We therefore affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

